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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JULIUS WALKER,
Petitioner-Claimant

v.

SUN SHIP, INC.,
Respondent

Petition for Writ of Certiorari To the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

Does an Administrative Law Judge (ALJ) have discretion under §12(d)(2) of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. §92(d)(2)] to excuse a claimant for his failure to give timely notice of injury where the ALJ finds as facts that (1) lateness was quite short, (2) the employer was not prejudiced, (3) great harm to the claimant would result otherwise, and (4) there was no fault on the part of the claimant.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, JULIUS WALKER, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit filed July 26, 1982, which remanded the matter to the Office of Administrative Law Judges with instruction to dismiss.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Third Circuit appears at page A1 of the Appendix.

2. The Opinion and Order of the Benefits Review Board of the U.S. Department of Labor of June 15, 1981, the subject of review by the United States Court of Appeals for the Third Circuit, appears in the Appendix at page A-11.

3. The dissenting opinion of Administrative Appeals Judge Julius Miller of September 22, 1981, appears in the Appendix at page A-19.

4. The decision and Order of Administrative Law Judge Edwin S. Bernstein of September 6, 1979, appears in the Appendix at page A-26.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit denying the Petition to review the Order of the Benefits Review Board and remanding the case to the Office of Administrative Law Judges with instructions to dismiss was filed July 26, 1982. This Petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

THE APPLICABLE STATUTE

This case involves the construction and interpretation of two sections of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.

The first section involved is section 12(a), which provides:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given (1) to the deputy commissioner in the compensation district in which the injury occurred, and (2) to the employer.

Section 12(d)(2) of the Act provides for an exception to the notice requirement in the following language:

> Failure to give such notice shall not bar any claim under this chapter . . . (2) if the deputy commissioner [now administrative law judge] excuses such failure on the ground that for some satisfactory reason such notice could not be given. . . .

STATEMENT OF THE CASE

Julius Walker was employed by Sun Ship, Inc., for approximately thirty (30) years. During a good part of this time he worked as a "burner" and consequently was exposed to toxic vapors in closed quarters. In December of 1974, he found it necessary to leave work after inhaling paint fumes. Four days later he entered the hospital for what appeared to be pneumonia. Although he was released from the hospital twelve days later, he never returned to work.

In September of 1975, Walker made inquiries of an attorney as to whether he was entitled to Worker's Compensation for an eye injury. During the course of his inquiry, he disclosed that he was unemployed because of a lung problem.

The attorney sent him to see a lung specialist. He obtained an examination in November of 1975, at which

time the specialist told him he had a lung illness which was "attributable to his work". Claimant filed a claim with the appropriate authorities for his lung problem on February 5, 1976, but it was not until March 10, 1976 that the employer received a copy of the claim.

The case was heard by an Administrative Law Judge who held that Walker's failure to give notice of a disabling injury within thirty (30) days was not barred because the employer had knowledge of the injury. This was affirmed by the Benefits Review Board, but on appeal to the United States Court of Appeals for the Third Circuit, it was reversed on the ground that in order to render §12(d)(1) applicable, the employer had to know not only of the injury (the lung problem), but also that the claimant's job was the cause of the injury. Therefore, that Court reversed the Board's decision, since the evidence did not support a finding that the employer had knowledge that the claimant's lung problems were work-related. However, that Court remanded the case since there had been no inquiry as to whether claimant's failure to give timely notice was excusable pursuant to §12(d)(2). That case is found in *Sun Shipbuilding and Dry Dock Company v. Walker*, 590 F. 2d 73 (d Cir. 1978).

On remand, Administrative Law Judge Bernstein, noting that Congress "intended to afford Administrative Law Judges a good deal of discretion in determining excusability . . ." excused the claimant's late notice on the ground that lateness of notice must be considered in the light of four factors. Applying these factors, the ALJ found: (1) the claim was filed only 70 to 75 days beyond the thirty day requirement, (2) there was no evidence of prejudice to the employer, (3) denial of the claim would drastically penalize the claimant who was totally disabled by his lung problems, and (4) claimant was not at fault for his failure to give a timely notice.

The employer appealed the decision of the ALJ to the Benefits Review Board where a majority reversed.

Walker appealed the decision of the Benefits Review Board to the Third Circuit Court of Appeals which affirmed and directed that the claimant's claim should be dismissed.

Federal jurisdiction exists pursuant to 33 U.S.C. §921(c), which provides for a Review of Final Orders of the Benefits Review Board by the appropriate Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The decision in the instant case is legally philosophically contrary to the result reached by the Court of Appeals for the Fourth Circuit with respect to a similar factual situation.

Section 12 of the Act provides that notice of a work-related injury must be given within thirty (30) days, a short period of time. But by Section 12(d)(2) of the LHWCA Congress vested in the administrative Law Judge discretion to excuse failure to give notice. The cornerstone for the application of this provision is the discretion of the Administrative Law Judge. The decision in the instant case failed to consider whether the administrative law Judge abused his discretion in excusing notice. This decision is in error and is also contrary to the result reached by the Court of Appeals for the Fourth Circuit in a similar factual situation.

In *Bethlehem Steel Corporation vs Parker*, 163 F.2d 334 (4th Cir. 1947) the court stated:

> We think the wording of the Act, its purposes and its history, make it quite clear that the powers of the Deputy Commissioner to excuse the timeliness of notice (since distinguished from the sheer failure to give any notice whatsoever) are very broad. This power is given by the Act in wide, general terms, and can be exercised by the Deputy Commissioner

for "some satisfactory reason." Manifestly, the decision of what reasons are, and what reasons are not, satisfactory is left to the Deputy Commissioner. The Act sets out no principles, no standards, to guide the Deputy Commissioner in making a decision.

In the instant case the Administrative Law Judge has set forth a four part standard to consider if a "satisfactory reason" has been presented by a claimant in his request that notice be excused. The majority of the Benefits Review Board in considering this four part standard did not rule that the standard was unlawful or in anyway erroneous. What the majority of the Benefits Review Board did was to disagree with the Administrative Law Judge's finding that under the standard, which he, the Administrative Law Judge applied, the claimant acted without fault. This is a finding of fact by the Administrative Law Judge. It is error for the Board to disagree with an Administrative Law Judge's finding of fact when such findings of fact are supported by substantial evidence. The Board must affirm a decision if the findings of the Administrative Law Judge are supported by substantial evidence in the record considered as a whole, if the findings are rational and if the decision is in accordance with the law. *Bank v. Chicago Grain Trimmers Association*, 390 U.S. 459 (1968); *Keith v. Smith Associates*, 380 U.S. 359 (1965); *Lehry v. Brown-Pacific-Maxon, Inc.* 340 U.S. 504 (1965); *Cardillo v. Liberty Mutual Insurance Company*, 330 U.S. 469 (1974).

The decision of the Court in the instant case fails to consider this question.

II. The decision in the instant case is legally and philosophically contrary to the result reached by the Court of Appeals for the Fifth Circuit with respect to a similar factual situation.

In *Smith v. Aerojet General Shipyards, Inc.*, 647 F. 2d 518 (5th Cir. 1981), one of the defenses of the em-

ployer to a death claim filed under the Longshoremen's and Harbor Workers' Act was that the widow failed to provide the employer with timely notice of death. In that case, the Administrative Law Judge found in favor of the *employer*. In order to disturb that finding, the Court of Appeals had to, in effect, reverse an Administrative Law Judge — a rarity in this field.

Notwithstanding the finding of the Administrative Law Judge, the Fifth Circuit said that it had a mandate under the Act to apply the provisions of the Act in such fashion as to avoid "harsh and incongruous results" and not to "construe the Act so as to enable employers to escape liability for persons entitled to recover . . . by reading into [the law] technical restrictions on the tolling of the filing period which are inconsistent with the purpose of the Act."

Basing its decision on the entire record, the 5th Circuit found that the circumstances constituted "a satisfactory reason" for the failure of the widow to give the notice required by the law.

Basically the 5th Circuit found that the widow was "barely literate" and there was a complete absence of prejudice to the employer by the failure to give notice. Adding all the circumstances together, the Court concluded that the widow's claim "should not be time barred due to her failure to comply with the 30-day notice requirement."

We submit that the *Smith* case, *supra*, and the instant case are diametrically opposed.

III. The opinion of the Court in the instant case does not properly consider the *Smith* case.

The opinion of the Court in the instant case relegates a discussion of *Smith v. Aerojet General Shipyards*, *supra*, to a footnote (footnote 2). This footnote indicates the Court does not believe the case is comparable and furthermore states that the 5th Circuit "did not state

whether it found" the excuse for failure to give notice to be "within §212(d)(1) or 12(d)(2)."

We respectfully submit that it is quite clear from the opinion that the 5th Circuit is relying upon §12(d)(2) because it discusses that problem under a separate section lettered "C" with the title "Given the circumstances of this case, does the record reveal a satisfactory reason excusing Smith's widow's failure to comply with §12's 30-day notice of death requirement."

It is quite clear from the heading of the section that the Court is referring to *an excusing* of the failure to give notice. Subsection (2) of 12(d) uses the language "excuses" whereas subsection (1) uses no such language. It is quite clear from footnote 2 to the opinion in the instant case that the Court has not thoroughly analyzed the *Smith* case and did not recognize that its holding in the instant case is contrary to the holding of the Court in the *Smith* case.

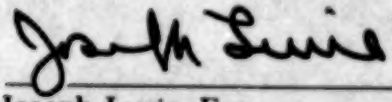
IV. The matter of deciding the instant case is an important issue of Federal Law which should be settled by this Court.

The essential issue in the instant case is what constitutes a "satisfactory reason" to be found by the Administrative Law Judge to excuse the failure of a claimant to give the thirty day notice required by the Act. Because of the short period in which notice must be given, the problem arises frequently, yet there is a dearth of reasoned judicial precedent on the subject. We respectfully submit that in the language of Rule 19 of the Rules of the United States Supreme Court, the issue is "an important question of Federal Law which has not been, but should be, settled by this Court . . ."

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2079

JULIUS WALKER,
Petitioner-Claimant

v.

SUN SHIP, INC.,
Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR

BRB No. 79-628)

Argued April 1, 1982

Before: GIBBONS, SLOVITER, and BECKER,
Circuit Judges

(Opinion filed July 26, 1982)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

This is the second time that we have considered this claim for disability compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. In the first appeal, we sustained the contention of the employer, Sun Ship, that claimant Walker was not excused from his failure to comply with the notice requirement contained in section 12(a) of the Act, 33 U.S.C. §912(a), by section 12(d)(1) of the Act, 33 U.S.C. §912(d)(1), but we remanded in order to afford Walker an opportunity to demonstrate that he was excused pursuant to section 12(d)(2) of the Act, 33 U.S.C. §912(d)(2). *Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73 (3d Cir. 1978). The Administrative Law Judge then held that Walker's failure to give notice within thirty days as required by the Act was excused under section 12(d)(2), and awarded compensation to Walker. The Benefits Review Board vacated the ALJ's award, holding that Walker was not excused from the failure to give timely notice. We deny the petition for review of the decision of the Benefits Review Board.

I.

The facts of this case are not disputed. Walker was employed at Sun Ship's Chester, Pennsylvania shipbuilding facility for thirty-two years. During most of that time, he worked as a "burner" and was regularly exposed to toxic vapors in close quarters. On December 10, 1974, Walker was compelled to leave work after inhaling paint fumes. After four days at home, Walker entered the hospital, where he was treated for pneumonia. Although he was released from the hospital shortly thereafter, Walker has never returned to work. He filed a claim for non-occupational disability benefits and received twenty-six weeks of benefits beginning in early 1975.

In September 1975, Walker contacted the law firm of Galfand, Berger, Senesky, Lurie & March (Firm) about the possibility of obtaining workers' compensation for an eye injury sustained in 1953. In the course of this meeting, Walker revealed that he was unemployed as a result of lung problems. At counsel's suggestion, Walker was examined on November 25, 1975 by a lung specialist. At the conclusion of this examination, the physician informed Walker and his son (who was also present) that Walker had a lung illness attributable to his working at Sun. In a letter of December 11, 1975, received by the Firm on December 13, the physician notified counsel of the results of the examination. Shortly thereafter, a member of the Firm telephoned Walker's son to advise him that the physician had concluded that Walker's lung illness was work-related, and was told by the son to "get the ball rolling" on a compensation claim.

A claim for Walker's eye injury was filed by the Firm on January 5, 1976, but no claim for the lung illness was filed until February 5, 1976. Sun did not receive a copy of the lung claim until March 10, 1976.

Sun opposed the claim on the ground that Walker had failed to give it notice of his injury within thirty days as required by section 12(a) of the Act. Following a hearing, the Administrative Law Judge held that Walker's claim was not barred because it fell within the exception contained in section 12(d)(1), which pro..des that failure to give notice shall not bar a claim if the employer "had knowledge of the injury or death and the deputy commissioner [now ALJ] determines that the employer . . . has not been prejudiced by failure to give such notice." The Benefits Review Board affirmed, but we reversed, holding that in order "[t]o bring Section 912(d)(1) into play, the employer must know that the employee was injured *and that his job was the cause.*" *Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73, 76 (3d Cir. 1978) (emphasis added). We concluded that "the circumstances of this case do not support a

finding that Sun knew that Walker's job was the cause of his injury." *Id.* However, "[i]n order to fully effectuate the beneficent purposes of the Act," we remanded to allow Walker an opportunity to show that his failure to give notice should be excused under section 12(d)(2). *Id.* at 77.

On remand, the ALJ stated that Congress "intended to afford administrative law judges a good deal of discretion in determining excusability [under section 12(d)(2)] in order to avoid harsh and unjust results which would be contrary to the humanitarian and beneficent goals of this legislation." He concluded that excusability under section 12(d)(2) should be governed by a number of factors: "(1) the length of time involved (2) whether the employer was prejudiced (3) the harm that will result to Claimant and, most important, (4) fault on the part of Claimant." The ALJ found that the delay in this case "was relatively short;" that Sun had not been prejudiced; that "the denial of this claim will penalize Claimant drastically;" and that counsel's fault in failing to give notice should not be imputed to Walker, "an uneducated and unsophisticated individual [who] retained an experienced workers' compensation law firm to represent his interests and . . . relied upon counsel to do everything necessary to protect [his] interest." The ALJ held that therefore Walker's failure to notify Sun was excused, and ordered that Sun make permanent disability compensation payments to Walker.

On appeal by Sun, the Benefits Review Board vacated the compensation award, holding, *inter alia*, that the failure to give timely notice was not excused by Walker's reliance on his counsel. The BRB remanded the claim with instructions to dismiss. Walker filed this petition for review.

II.

Section 12(a) of the Longshoremen's and Harbor Workers' Compensation Act provides:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given (1) to the deputy commissioner in the compensation district in which the injury occurred, and (2) to the employer.

33 U.S.C. §912(a). It is conceded that timely notice was not given in this case. Section 12(d) of the Act, however, provides for two exceptions to the notice requirement imposed by Section 12(a):

> Failure to give such notice shall not bar any claim under this chapter (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

33 U.S.C. §912(d). In our earlier opinion in this case, we held that the exception contained in section 12(d)(1) was not applicable since the evidence established that Sun did not have knowledge of the work-relatedness of Walker's injury. We are now required to determine

whether to sustain the decision of the BRB that the section 12(d)(2) exception is inapplicable.

Under section 12(d)(2), if the claimant shows a satisfactory reason why such notice could not be given, the ALJ may excuse the failure to give notice even if the employer has been prejudiced. Sun contends that Walker does not fall within the section 12(d)(2) exception, since there has been no showing that notice "could not be given", as required by the statute. Sun would have us interpret the language "could not" as a requirement that Walker was *unable* to give timely notice. It argues that if Congress had intended to excuse the failure to give notice for *any* satisfactory reason, it could have done so by using the language "satisfactory reason why notice *was* not given" in lieu of "could not be given." We need not decide whether "could not" imposes a strict inability requirement, since we conclude that even under a more lenient excusable neglect standard, Walker has failed to demonstrate a "satisfactory reason" for his failure to comply with the notice requirement.

Walker argues that he was entitled to rely on his counsel, and that counsel's negligence, if any, should not be imputed to him. However, in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962) (plurality opinion), the Court stated:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Accord, Spering v. Texas Butadiene & Chemical Corp., 434 F.2d 677, 680 (3d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971). The Administrative Law Judge chose not to follow the general rule stated in *Link*, concluding that "in workers' compensation cases . . . the views of the dissent in *Link* are more appropriate." The ALJ seems to have held that reliance on counsel was a "satisfactory reason" within the meaning of section 12(d)(2). The ALJ's view that "the Act's humanitarian goals would be thwarted by not excusing [the] untimely notice [in this case]" is not an adequate basis for departing from the general principle that a civil litigant is bound by the action or inaction of his attorney. *See Kushner v. Winterthur Swiss Insurance Co.*, 620 F.2d 404, 407-08 (3d Cir. 1980) (distinguishing between civil cases and the constitutional right to effective assistance of counsel in criminal cases). As the Supreme Court stated in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952), in construing another limitations provision of the LHWCA:

> We are aware that this is a humanitarian Act, and that it should be construed liberally to effectuate its purpose; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all.

Even if Walker could rely on his counsel, such reliance can excuse his failure to give notice only if the Firm itself had a "satisfactory reason" for failing to comply with the statutory requirement. The explanation proffered is that in December 1975, when the Firm first became aware of the possibility of a claim based on Walker's lung disability, it believed that notice was unnecessary, since Sun already had knowledge of Walker's injury and the statute did not require that it also have knowledge of the work-relatedness of the injury. Walker contends that this belief was reasonable in view of two

decisions of the Benefits Review Board rendered in 1975 which held that the employer's knowledge of a claimant's injury was sufficient to trigger the section 12(d)(1) exception even if the employer had no knowledge of the work-relatedness of the injury. *Leyden v. Capital Reclamation Corp.*, 2 BRBS 24 (June 24, 1975), aff'd mem., 547 F.2d 706 (D.C. Cir. 1977); *Davis v. Strachan Shipping Co.*, 2 BRBS 272 (September 18, 1975), *rev'd*, 571 F.2d 968 (5th Cir. 1978).[1] However, on January 2, 1975, this court, in *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146, 151 (3d Cir. 1975), had stated,

> It is obvious that the knowledge requirements in sections 912(d) and 930(f) must refer to knowledge on the part of the employer of an injury sustained or an ailment incurred as a result of working conditions for which the employer is responsible. *Such knowledge must relate to the person injured, as well as to an injury arising from the employment.* We cannot infer a congressional intent that the knowledge requirement can be fulfilled, and that the employer may therefore be liable, when the employer has no reason to know whether it is the party responsible for the injury or ailment of a particular employee. [emphasis added].

After *Bowman*, therefore, attorneys in this circuit at least were on notice that the work-relatedness of an injury was an important component of the knowledge requirement of section 12(d). It is conceded that the Firm was aware of the *Bowman* decision at the time the decision

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1. In neither the *Leyden* case nor the *Davis* case did the BRB suggest that claimant had filed a claim for non-occupational disability benefits for the same injury. The ALJ opinion in Walls v. Sun Shipbuilding & Dry Dock Co., No. 75-LHCA-269 (Aug. 14, 1975), which was filed after the BRB's *Leyden* opinion but before its *Davis* opinion, stressed the fact that the claimant had filed for such non-occupational benefits. In this case as well, claimant had filed for and received non-occupational disability benefits.

not to give notice was made. Moreover, an Administrative Law Judge decision in August 1975, in a claim represented by this same Firm, had reached a similar conclusion to that reached in *Bowman*. *Walls v. Sun Shipbuilding & Dry Dock Co.*, No. 75-LHCA-269 (August 14, 1975). In *Walls*, the ALJ held that the claim was "barred by failure of the Claimant to give timely notice required by Section 12(a) of the Act." The ALJ noted that the claimant had expressly denied having suffered accidental injury when he applied for and received non-occupational sick benefits, stating " 'The normal conclusion to be drawn by a reasonably prudent employer f[illegible] the evidence before him . . . is that the employee had suffered an illness not due to his occupation and for which he was being compensated. This would negate any thought the employer would have that the employee was going to assert a claim under the Workmen's Compensation Law.' " The ALJ distinguished an earlier case on the ground that "[i]n that case it was found that the employer had knowledge of the employee's illness and the probable connection between the illness and his employment."

Walker contends that even if his counsel's inaction can properly be imputed to him, it was not unreasonable for the Firm to have believed in 1975 that it was not necessary to give Sun notice of the claim that Walker's injury, which it was aware of, was connected to his employment. Both the ALJ and the BRB rejected this contention, the ALJ stating that "[a]lthough there were conflicting decisions, after learning about the decision in *Walls* and especially after learning about the decision in *Bowman*, that firm should have filed a Section 12 notice within 30 days of the date that Claimant learned of his work-related condition." We agree with the Benefits Review Board that the explanation given by the Firm cannot be considered a "satisfactory reason" in the face of

both *Bowman* and *Walls*.[2] Walker's claim must therefore be dismissed.

For the foregoing reasons, we deny the petition for review of the order of the Benefits Review Board vacating the award of the ALJ and remanding to the Office of Administrative Law Judges with instructions to dismiss.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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2. We do not believe the situation in this case is comparable to that presented in Smith v. Aerojet-General Shipyards, Inc., 647 F.2d 518 (5th Cir. 1981), on which plaintiff places his principal reliance. In *Smith*, the issue involved filing under section 13 and notice under section 12 of the disability claim by Smith and the section 12 notice of the death claim by Smith's widow following his demise during the litigation. Smith had worked for ten shipyards, and it was necessary to determine which was "last employer" to which the disease or injury was causally linked. The court held that notice need not be given until the determination was made against which employer there was an actionable claim, and therefore found that Smith had given timely notice to Aerojet, the shipyard at issue, by notifying it even before there was a determination that he had an actionable claim against that company. In holding that Smith's widow was excused for failure to give Aerojet notice of the death claim within 30 days after Smith's death, the court did not state whether it found such excuse fell within section 12(d)(1) or 12(d)(2). The court emphasized that the claimant was "barely literate;" that at the time of her husband's death his disability compensation claim against the same employer had been in litigation for over four years, undoubtedly creating the impression that the "question of promptness [was] seemingly irrelevant;" and that the employer had not been prejudiced by the delay, since it had been aware of and indeed had been investigating the alleged injury for some time in connection with the litigation of the disability compensation claim. *Id.* at 525. Unlike this case, there was no attempt to use the inaction of counsel as a "satisfactory reason" for the claimant's failure to notify Aerojet.

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 79-628

JULIUS WALKER *Claimant-Respondent*	:	Filed as part of the record
	:	June 15, 1981
v.	:	
SUN SHIPBUILDING & DRY DOCK COMPANY *Self-Insured* *Employee-Petitioner*	:	Clerk Benefits Review Board
	:	DECISION and ORDER

Appeal from the Decision and Order on Remand of Edwin S. Bernstein, Administrative Law Judge, United States Department of Labor.

E. Lawrence Hannaway (Galfand, Berger, Senesky, Lurie & March), Philadelphia, Pennsylvania, for the claimant.

Jeffery C. Hayes and Peter J. M. Rohall (Pepper, Hamilton & Scheetz), Philadelphia, Pennsylvania, for the self-insured employer.

Before: SMITH, Chief Administrative Appeals Judge, MILLER* and KALARIS, Administrative Appeals Judge.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by the self-insured employer from the Decision and Order on Remand (76-LHCA-747) of

* Dissent by MILLER, Administrative Appeals Judge, to follow.

Administrative Law Judge Edwin S. Bernstein pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *eq seq*. (hereinafter, the Act). The issue in this case is whether claimant's failure to give timely notice of injury should be excused under Section 12(d)(2) of the Act. 33 U.S.C. §912(d)(2).

Claimant was employed by employer for 30 years. During the majority of this time, claimant was employed as a "burner" and was exposed to toxic vapors in close quarters. On December 10, 1974, claimant found it necessary to leave work after inhaling paint fumes. Four days later, claimant entered the hospital for treatment of what appeared to be pneumonia. Although claimant was released from the hospital 12 days later, he did not return to work. He filed and received 26 weeks of *non-occupational* disability benefits for this "injury."

In September 1975, claimant made inquiries with a law firm as to whether he was entitled to workers' compensation for an eye injury that he had sustained in 1953. In the course of this inquiry, claimant disclosed that he was not presently employed due to lung problems. The attorney advised him to see a lung specialist. After an examination on November 25, 1975, a doctor told claimant and his son that claimant had a lung illness that was "attributable to his working" with employer. Claimant's counsel was notified of the results of this examination on December 11, 1975, but did not give notice of injury to employer within 30 days. On January 5, 1976, claimant filed a claim for his eye injury and filed a claim for his lung problems on February 5, 1976. It was not until March 10, 1976, that employer received a copy of the claim for the lung problems.

This appeal is the second time this case has been before the Board. Originally, a hearing was held before Administrative Law Judge David Pelkey. He held that pursuant to Section 12(d)(1) the claim was not barred by claimant's failure to give notice of his disabling condition

within 30 days as required. This decision was affirmed by the Board. On further appeal, the United States Court of Appeals for the Third Circuit held that in order to trigger Section 12(d)(1), employer had to know both that claimant had been injured and that claimant's job was the cause of this injury. Accordingly, the court reversed the Board's decision since the evidence did not support a finding that employer knew that claimant's injury was work-related. However, the case was remanded since there had been no inquiry into whether claimant's failure to give timely notice was excusable pursuant to Section 12(d)(2). *Sun Shipbuilding and Dry Dock Co. v. Walker*, 590 F.2d 73 (3rd Cir. 1973).

On remand, Administrative Law Judge Bernstein noted that Congress intended to afford administrative law judges "a good deal of discretion in determining excusability. . . ." He held that the four factors which should be considered in determining the application of Section 12(d)(2) are: (1) the length of time involved, (2) whether the employer was prejudiced, (3) the harm that will result to claimant, and (4) fault on the part of claimant. Applying these factors, the administrative law judge found: (1) the claim was filed only 70-75 days later than the 30 day requirement, (2) there was no evidence of prejudice to employer, (3) denial of the claim would drastically penalize the claimant, and (4) claimant was not at fault for the untimely notice. Regarding the latter, the administrative law judge found that, although claimant's counsel was part of an experienced worker's compensation law firm, his failure to give the required Section 12 notice should not be imputed to claimant. He further noted claimant's feeble condition and inability to comprehend the requirements of the Act. Thus, the administrative law judge found that claimant's failure to give timely notice pursuant to Section 12(a) was excused under Section 12(d)(2).

Employer appeals the administrative law judge's decision that claimant's failure to give timely notice of his

injury was excused pursuant to Section 12(d)(2) of the Act. 33 U.S.C. §912(d)(2).[1] In response, claimant contends that the decision of the administrative law judge should be affirmed but modified to hold that claimant's counsel acted reasonably in not filing a timely Section 12 notice, given the state of the law in 1975.

The scope of the Board's review is limited. Consequently the decision and order of the administrative law judge must be affirmed if it is supported by substantial evidence in the record, is not irrational, and is in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 1359 (1965).

While both employer and claimant agree that the administrative law judge has the discretion under Section 12(d)(2) to excuse a failure to give timely notice, the parties differ on the extent of that discretion. Employer argues that the express language of Section 12(d)(2) limits the administrative law judge to excusing a failure to give notice only when two conditions have been met: first, the reason offered by claimant must explain why notice "could not be given,"[2] and second, this reason must be found by the administrative law judge to be a "satisfactory" one. The administrative law judge's discretion must be exercised within the bounds of reasonableness. Claimant, however, argues that the adminis-

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1. On appeal employer also argues that it was error for the administrative law judge to reinstate the 10 percent additional assessment that had been ordered in the original Decision and Order and that employer is entitled to a credit for payments of the additional assessment that employer has already paid. We do not reach these issues.

2. In his response brief, claimant argues against reading "could not have been given" as only referring to physical impossibility. However, employer did not request such a limited interpretation, and our decision today is not intended to so limit the statutory language. *See* Employer's Brief, p. 15.

trative law judge's discretion pursuant to Section 12(d)(2) is very broad.[3]

Employer specifically argues that the administrative law judge erred in finding that claimant had advanced "satisfactory" reasons for why notice could not have been given. In his Response Brief, claimant contends that the Board should affirm the administrative law judge's decision to excuse claimant's failure to file timely notice because claimant is an uneducated and unsophisticated individual and because he relied on his counsel to do what was necessary to perfect his claim.

However, *Voris v. Eikel, supra,* held that a claimant's illiteracy was not an "excuse" for why Section 12 notice could not have been given.[4] Accordingly, we hold that the fact that claimant is uneducated and unsophisticated is not a satisfactory reason for finding that notice could not have been given.

In appealing the administrative law judge's decision to excuse claimant's failure to give timely notice, employer also argues that claimant's reliance on his attorney to take all necessary steps in filing a claim is not a reasonable excuse; and in fact, this negligence of claimant's counsel should be imputed to claimant.

While conceding that no notice of claimant's injury was given within 30 days of discovering the work-relatedness of this injury, claimant maintains that under the

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3. In support of its argument, employer cited to *Voris v. Eikel,* 200 F.2d 724 (5th Cir. 1952), *rev'd,* 346 U.S. 328 (1953), and *McTaggart v. Lowe,* 69 F. Supp. 101 (D.N.J. 1946). Claimant, on the other hand, cited to *Bethlehem Steel Co. v. Parker,* 163 F.2d 334 (4th Cir. 1947), to support his position. *See also Brady-Hamilton Stevedore Co. v. O'Leary,* 238 F. Supp. 634 (D. Ore. 1964), and *State Compensation Insurance Fund v. Foulds,* 167 Colo. 123, 445 P.2d 716 (1968).

4. The Supreme Court reversed the Fifth Circuit's decision in *Voris.* However, the Court reversed because under its interpretation of the facts, employer had sufficient notice of the injury to excuse the failure to give written notice. Therefore, the Court did not consider Section 12(d)(2). *Voris v. Eikel,* 346 U.S. 328 (1953).

instant facts, his decision not to file notice was reasonable. Claimant argues that based on the Board's decision in *Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24, BRB Nos. 74-226/A (1975), *aff'd mem.* 547 F.2d 702 (D.C. Cir. 1977), and *Davis v. Strachan Shipping Co.*, 2 BRBS 272, BRB Nos. 75-102/A (1975), it was not necessary to give notice.

However, after careful review of these cases, we hold that claimant's reliance on *Leyden* and *Davis* was not reasonable. Section 12(a) is explicit in its requirement that notice of an injury or death must be given to both the deputy commissioner and the employer within 30 days of either the date of the injury or death, or knowledge of the work relatedness of the injury or death, whichever is applicable. 33 U.S.C. §912(a). Compliance with the notice requirement of Section 12(a) is necessary in order to provide the employer with an adequate opportunity to determine the validity of a claim for compensation. In the instant case, claimant had knowledge that his injury was work-related, yet failed to give timely notice as required by Section 12(a), because his counsel believed that Section 12(d)(1) excepted such notice. However, the exception in Section 12(d)(1) should not be applied so as to frustrate the purpose behind the notice requirement.

Section 12(d)(1) was not intended to apply where a claimant has knowledge of the work-relatedness of his injury buy willfully decides not to give notice.

Moreover, at the time claimant gained knowledge of the work-relatedness of his lung problem, the United States Court of Appeals for the Third Circuit has held that, in order to trigger Section 12(d)(1), employer must have knowledge not only of claimant's injury, but also of the work relatedness of this injury. *See Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146 (3rd Cir. 1975). While there is old Board law to the contrary, the instant case arose within the jurisdiction of the Third Circuit, and claimant was obliged to follow the law as an-

nounced by that Circuit. Accordingly, claimant's reliance on *Leyden* and *Davis* was unreasonable and does not constitute a "satisfactory reason" for not giving notice under Section 12(d)(2).

In the instant case, claimant's counsel was responsible for claimant's non-compliance with Section 12 of the Act. We must now determine whether counsel's failure to give timely notice of injury should be imputed to claimant.

The administrative law judge held that, since this was a compensation case and not a case between a "sophisticated businessman and an attorney . . .," claimant should not be bound by his counsel's inaction. Decision and Order, slip op. at 14. To further support this position, the administrative law judge referred to the dissenting opinion of Justice Black in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

Contrary to the decision of the administrative law judge, we hold that under the facts of the instant case, the majority's opinion in *Link* is more applicable. The following rationale from that decision is relevant:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the Act or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney.

370 U.S. at 633. *See also Spering v. Texas Butadiene & Chemical Corp.*, 434 F.2d 677 (3rd Cir. 1970); 7 Am. Jur. 3d, Atty. At Law, Section 110. We hold that under the facts of the instant case, counsel's failure to give proper notice of claimant's injury must be imputed to claimant. Therefore, the administrative law judge abused his discretion when he found that there were

"satisfactory reasons" for why notice of claimant's injury could not have been given.

Our resolution of the Section 12(d)(2) issue establishes that the claim is barred as a result of claimant's failure to give proper notice. Accordingly, the award is vacated and the case is remanded to the Office of Administrative Law Judges with instructions to dismiss. Given this disposition, the issues concerning Section 14(e) are rendered moot. 33 U.S.C. §914(e).

SO ORDERED.

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

I Concur:

ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 15th
day of June 1981

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 79-628

JULIUS WALKER *Claimant-Respondent*	:	Filed as part of the record
	:	September 22, 1981
v.	:	
SUN SHIPBUILDING & DRY DOCK COMPANY *Self-Insured* *Employee-Petitioner*	:	Clerk Benefits Review Board
	:	DECISION and ORDER

MILLER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to vacate the administrative law judge's award and to remand this case for a dismissal of the claim. In reaching their decision that this claim is barred as a result of claimant's failure to give proper notice, my colleagues apply an overly technical and strict interpretation to the Act. Accordingly, I cannot join in this decision which contravenes the well recognized purpose and intent of the Act.

The Act is remedial legislation designed to compensate employees (or their dependents) for injuries (or deaths) that are sustained by covered employees in the course of their employment. Since the Act is remedial legislation, it must be liberally construed in conformance with this purpose. Therefore, the Act must be construed in a way which "avoids *harsh* and incongruous results." *Voris v. Eikel*, 346 U.S. 328 (1953) (emphasis added). *See Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932).

Consistent with the requirement that the Act is to be construed in a manner which "avoids harsh and incongruous results," it has also been held that the Act should not be construed so as to read into it technical restrictions on the tolling of the filing period which are inconsistent with the purpose of the Act.

> As the Court stated in *Blackwell Construction Co. v. Garrell*, 352 F. Supp. 192 at 196 (1972):
>
> > It is well recognized that the [Longshoremen's] Act is to be liberally construed in the light of its remedial and humanitarian purpose. . . . The Court will not construe the Act so as to enable plaintiffs to escape liability to persons entitled to recover for an admittedly compensable death [or injury] by reading into it technical restrictions on the tolling of the filing period which are inconsistent with the purpose of the Act.
>
> The *Blackwell* case involved an interpretation of Section 13(a) of the Act which provides for tolling of the statute during periods when compensation is paid without an award. Accordingly, the facts differ from those in the instant case. However, *the principle of avoiding technical restrictions is applicable.*

Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead, 8 BRBS 159, 160-61, 571 F.2d 272, 274 (5th Cir. 1978), *aff'g* 6 BRBS 84, BRB No. 76-252 (1977) (emphasis added; brackets and ellipses in original). *See also Smith v. Aerojet-General Shipyards, Inc.*, 13 BRBS 391, 647 F.2d 578 (5th Cir. 1981), *rev'g and remanding* 9 BRBS 225, BRB Nos. 76-346/A (1978) (Miller, dissenting) (*Blackwell* cited with approval and applied to Section 12).

In the instant case, my colleagues hold that claimant's claim must be barred because claimant did not give notice of his injury until 70 to 75 days after the expiration of the period provided in Section 12(a) of the Act, 33

U.S.C. §912(a). My colleagues reach their decision in spite of the absence of any evidence showing that employer has been prejudiced by this delay.

The filing period in Section 12(a) is provided in order to give an employer and/or its insurance carrier an opportunity to collect and evaluate and evidence concerning the claim before this evidence is lost or destroyed and before memories begin to fade. *See Smith v. Aerojet-General Shipyards, Inc.* Therefore, where employer has not shown that it has been so prejudiced by claimant's delay in filing his notice of injury, I would hold that claimant's claim is not barred by the failure to strictly adhere to the filing period of Section 12(a). *See* my dissenting opinion in *Stevenson v. Linens of the Week*, BRBS , BRB No. 80-463 (dissent filed on Aug. 17, 1981).

In their opinion, my colleagues state that the exception enumerated in Section 12(d)(1) should not be applied so as to frustrate the purpose behind the notice requirement. Decision and Order at 7. My colleagues, however, must be mindful not to apply the notice requirement in an overly technical manner so as to frustrate the purpose behind the Act.

In addition, in determining whether claimant has advanced a "satisfactory reason" for why notice "could not be given" pursuant to Section 12(d) (2), one must give consideration to the totality of the situation. *Smith v. Aerojet-General Shipyards, Inc.*, 13 BRBS at 396-97; *see Johnson v. Treyja, Inc.*, 5 BRBS 464, 470, BRB No. 76-237 (1977). My colleagues approach the issue of whether claimant has advanced a "satisfactory reason" by considering each factor separately. Such an approach fails to accurately evaluate the circumstances surrounding claimant's delay in filing and, thus, is not in accord with the intent of the Act that all doubts are to be resolved in favor of claimant. *Friend v. Britton*, 220 F.2d 820 (D.C. Cir. 1955); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965).

Moreover, in determining that reliance by claimant's counsel on those cases interpreting the exception to the notice requirement under Section 12(d)(1) was not a satisfactory reason for not giving notice, my colleagues hold that "[s]ection 12(d)(1) was not intended to apply where a claimant has knowledge of the work-relatedness of his injury but *willfully* decides not to give notice." Majority Opinion, slip op. at 7 (emphasis added).

"Willful" is defined as "[i]ntending the result which actually comes to pass; designed; intentional; not accidental or involuntary. . . . " *Black's Law Dictionary* 1773 (4th ed. rev. 1968).

> A "willful" act may be described as one done intentionally, knowingly, and purposely without justifiable excuse, *as distinguished* from an act done carelessly, thoughtlessly, heedlessly, or inadvertently.

Ibid. (emphasis added; citation omitted).

The instant record is void of any evidence (or even of any suggestion) that *claimant* willfully decided not to give notice to employer. In fact, the evidence shows, and the administrative law judge found, that claimant was relying upon his counsel to take the necessary steps to initiate his claim. Therefore, my colleagues' reference to a willful refusal to give notice is inappropriate in this case.

It is also important to note that the application of the exception enumerated in Section 12(d)(2) is within the discretion of the administrative law judge. This discretion must be exercised consistent with the liberal purpose of the Act and exercised so as to avoid "incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co. v. Norton*. Nevertheless, a decision to excuse a failure to give notice must be affirmed by the Board unless the administrative law judge has exercised this discre-

tion unreasonably.[1] The administrative law judge is to be given wide latitude in the exercise of his discretionary powers under Section 12(d)(2). *Cf. Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146, 148 n. 4 (3d Cir. 1975) (deputy commissioner's failure to excuse under Section 12(d)(2) upheld without comment). There is no indication in this record that the administrative law judge exercised his discretion unreasonably or otherwise abused his discretion.

Further, my colleagues hold that it was "unreasonable" for claimant to rely on Board case law when the United States Court of Appeals for the Third Circuit, the circuit in which this case arose, had taken a contrary position. The fact that this result is both "harsh and incongruous" is readily recognized when my colleagues' recent decision in *Jones v. J. F. Shea Co.*, BRBS , BRB No. 79-548 (June 16, 1981) (Miller, J., filed a dissenting opinion), is considered. In *Jones*, my colleagues "decline[d] to follow the D.C. Circuit's decision" in *Riley v. U.S. Industries/Federal Sheet Metal, Inc.* 12 BRBS 237, 627 F.2d 455 (D.C. Cir. 1980), *cert. granted*, 49 U.S.L.W. 3658, No. 80-518 (March 9, 1981). *Jones*, slip op. at 5 n. 2. In light of their holding in the instant case, it can only be assumed that any attorney who relies upon the Board's decision in *Jones* does so "unreasonably"; such a result cannot have been intended. Simply put, if the Board does not follow the decisions of the Courts of Appeals for the circuit in which a case arises, it is both "harsh and incongruous" to deny a claim by requiring claimants to accept the opinions of the Courts of Appeals as the applicable law. I must, therefore, conclude that it was *not* "unreasonable" for claimant to rely on Board case law in the case at hand.

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1. There is a lack of cases discussing the discretionary notice provisions of Section 12 due apparently to the fact that, in the past, failure to give notice had been routinely excused by the deputy commissioners, later by the administrative law judges, *see* 33 U.S. §919(d), without challenge.

My colleagues cite to *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1961), in holding that the failure of claimant's counsel to give timely notice should be imputed to claimant. *Link*, however, was not a workmen's compensation case; rather, *Link* concerned an accident between an automobile and a train. The policies behind the law which has developed in automobile-train accident cases are not necessarily consistent with the liberal policy and beneficent purpose that arise with cases brought under the Longshoremen's and Harbor Workers' Compensation Act. Therefore, the policies that led the Court in *Link* to impute counsel's actions (or inactions) to that of counsel's client are not applicable in cases arising under the Act. *See Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.25 1248 (5th Cir. 1980).

Finally, the Fifth Circuit's opinion in *Voris v. Eikel*, 200 F.2d 724 (5th Cir. 1952), *rev'd*, 346 U.S. 328 (1953), is relied upon by the majority for the proposition that claimant's illiteracy was not an "excuse" for why Section 12 notice could not be given. Majority Opinion, slip op. at 6. Although the Fifth Circuit's decision in *Voris* was reversed by the Supreme Court, my colleagues give an overly narrow reading to the Supreme Court's decision, attempting to limit it to consideration of Section 12(d)(1) and not Section 12(d)(2). Reference to the Supreme Court's decision in *Voris* is all that is required, however, to show that the proposition stated by the Fifth Circuit would also have been reversed by the Supreme Court had it been necessary to reach a decision under Section 12(d)(2).

> The Deputy Commissioner found that the claimant received a crippling injury, *that he was illiterate* and without instruction or knowledge as to whom to report his injury, and that the practice on the job of reporting injuries for medical assistance as recognized by the employer was followed in his case, and that the failure to supply medical assistance was

due to the negligence of the employer or his agents, and that the employer was not prejudiced by the failure to give written notice. *These findings are supported by the evidence in the record.* Under these circumstances, we hold that the Deputy Commissioner was justified in finding that the employer had notice of the injury within the meaning of §12(d). The burden of any failure of these agents to report must fall on the employer, and not on a longshoreman who follows the routine the employer prescribes. *Particularly is it true in this case where the claimant, who was totally illiterate* and only worked as a stevedore for two days, suffered a painful and crippling injury that necessitated removing him from the job to his home.

This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 414, 52 S.Ct. 187, 189, 76 L.Ed. 366. . . . The Deputy Commissioner properly construed the law, and his findings are supported by evidence.

346 U.S. at 333-34.

My colleagues, by giving an overly technical interpretation to the excuse provision of Section 12(d), bar this valid claim. Such a technical reading of the Act and such a drastic result were never intended by Congress when promulgating this Act. Accordingly, I would affirm the Decision and Order of the administrative law judge.

JULIUS MILLER
Administrative Appeals Judge

Dated this 22nd
day of September 1981

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036

In the Matter of	:	
	:	
JULIUS WALKER	:	
Claimant	:	
	:	Case No. 76-LHCA-747
v.	:	OWCP No. 3-8235
	:	
SUN SHIPBUILDING & DRY DOCK COMPANY	:	
Self-Insured Employer	:	

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Before: EDWIN S. BERNSTEIN
Administrative Law Judge

DECISION AND ORDER ON REMAND

This case involves a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* ("the Act"). Following a formal hearing, by Decision and Order dated September 13, 1976, Judge David W. Pelkey determined that the claim was not barred by Claimant's failure to give the Employer notice of his disabling condition within the 30-day period required by Section 12 of the Act, and Judge Pelkey awarded Claimant permanent, total disability compensation.

By Decision dated December 15, 1977 in BRB No. 76-438, the Benefits Review Board affirmed Judge Pelkey's Decision and Order, ruling that the exception in Section 12(d)(1) of the Act excused Claimant's omission to give timely notice. The Board held that the Employer knowing that Claimant entered the hospital with pneumonia, was bound to investigate the situation and by its failure to do so was charged with "knowledge of the injury".

By Decision dated December 19, 1978 in Case No. 78-1158, the United States Court of Appeals for the Third Circuit reversed the determination below. The Court held:

> "To bring Section 912(d)(1) into play, the employer must know that the employee was injured and that his job was the cause. [citing authorities] Regardless of whether one labels the Board's decision a factual or a legal error, or a hybrid of both, the circumstances of this case do not support a finding that Sun knew that Walker's job was the cause of his injury."

The Court continued:

> "Because of the result reached through his application of Section 912(d)(1), the Administrative Law Judge did not inquire into possible reasons which would excuse claimant's late notification

pursuant to Section 912(d)(2). In order to fully effectuate the beneficent purposes of the Act, we reverse and the case will be remanded in order that the claimant may be permitted an opportunity to offer an excuse, if any, for his neglect."

Pursuant to that Decision on February 1, 1979 the Benefits Review Board vacated its earlier decision and remanded the case to this office. Because Judge Pelkey is no longer with this office, the case was assigned to me. I conducted a formal hearing on June 19, 1979 in Philadelphia, Pennsylvania.

FINDINGS OF FACT

Claimant was employed at Sun's shipbuilding facility at Chester, Pennsylvania for 32 years from 1942 until 1974. He was a "burner" for nearly all that time, which caused him to be exposed to toxic vapors in close quarters. On December 10, 1974, Claimant inhaled paint fumes, and the coughing and gagging that ensued forced him to leave work that day. He remained home for four days. On December 14, 1974, Claimant entered the hospital for treatment for what appeared to be pneumonia. He was released 12 days later but did not return to work. Claimant received 26 weeks of non-occupational disability benefits.

At the hearing, Claimant, his son, Robert Walker and Joseph Lurie, a partner in the law firm that represented Claimant, all testified to essentially similar facts which are not disputed. I further find as follows. In September, 1975, Claimant visited the law firm of Galfand, Berger, Senesky, Lurie and March. Initially, Claimant told Mr. Lurie that he wanted to know whether he was entitled to receive any workers' compensation for an eye injury he sustained in 1953. When, in the course of their discussion, Claimant told Mr. Lurie that he was not working at the time because of lung problems, Mr. Lurie suggested that Claimant be examined by Dr. Peter

Theodos, a lung specialist, to determine whether Claimant's lung problems were work-related.

On November 25, 1975, Claimant accompanied by his son, was examined by Dr. Theodos. At the conclusion of the examination, Dr. Theodos informed Claimant and his son that, in his opinion, Claimant had a lung illness that was attributable to his working with Sun Shipbuilding & Dry Dock Company. By letter dated December 11, 1975, received in the office of Galfand, Berger on December 13, 1975, Dr. Theodos advised Mr. Lurie that Claimant had a lung illness that was causally related to his work at Sun. Shortly thereafter, Carol Pennes, Esquire, an attorney at Galfand, Berger to whom Mr. Lurie assigned the claim, telephoned Robert Walker to advise him that Dr. Theodos had concluded that his father's lung illness was work-related. In the course of that conversation, Robert Walker instructed Ms. Pennes "to get the ball rolling" on Claimant's compensation claim.

Although Dr. Theodos informed both Claimant and his son on November 25, 1975 that Claimant's lung illness was work-related, neither Claimant nor his son ever gave notice of Claimant's injury to Sun Shipbuilding.

Galfand, Berger sent Claimant a claim petition for his eye condition on December 18 and on or about January 5, 1976, Claimant's counsel filed a claim on Claimant's behalf for his eye injury.

On February 5, 1976, Claimant's counsel filed a claim regarding his lung problems with the Office of Workers' Compensation in Philadelphia. The Employer did not receive a copy of this claim until March 10, 1976.

When Claimant testified, he presented a picture of a physically and mentally feeble individual. His recall of the facts and understanding of the questions was poor. He had no excuse to offer and it seemed clear that he did not understand the requirements of the Act but depended entirely upon his counsel in this matter.

Claimant also apparently depended upon his son

Robert who apparently accompanied and helped Claimant in connection with his visits to Dr. Theodos and the Galfand, Berger law firm. Robert Walker testified that he did not know that his father was required to notify the Employer and, in addition, after he told Galfand, Berger to proceed with the claim he took it for granted that they would take care of everything that was necessary.

Mr. Lurie testified that his law firm did not notify the Employer because, based upon his understanding of the decisions of the Benefits Review Board at the time he did not feel that notice was necessary.[1]

During 1975 there were several contradictory decisions regarding the requirement to give notice pursuant to Section 12 of the Act. The Benefits Review Board several times held that an employer's knowledge that an injury had occurred was sufficient in itself to constitute knowledge under the Act, without any awareness that the injury was employment related.[2]

However, on January 2, 1975, the United States Court of Appeals for the Third Circuit adopted a contrary

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1. Mr. Lurie testified as follows:

A We had been representing the people at Sun Ship, I think, for — since about 1972-73 and, based upon the methodology there, we felt that, a, that they had knowledge of his injury and they should have had knowledge that the injury was work-related and, based on the cases that had come down up to that time by the Benefits Review Board, those two criteria were sufficient to satisfy the notice requirements.

Q So you thought that notice was unnecessary?

A That's right. Not only in this case, but — this is the attack we had taken in just about every case that we had represented people in up to this time.

2. In June, 1975 the Benefits Review Board issued its decision in *Leyden* v. *Capitol Reclamation Corp.*, 2 BRBS 24 (1975), stating at p. 30:

> It is enough if the employer knows of the injury and has facts that would lead a reasonable man to conclude that compensation liability is a possibility and that he therefore ought to investigate the matter further.

view in *Sun Shipbuilding & Dry Dock Co.* v. *Bowman*, 507 F.2d 146 (3d Circ. 1975).[3]

Additionally, on August 14, 1975 Administrative Law Judge George A. Fath reached a similar conclusion in *Walls* v.*Sun Shipbuilding & Dry Dock Company*, Case No. 75-LHCA-269. Mr. Lurie testified that he was familiar with the *Bowman* case and Mr. Lurie's law firm represented the claimant in the *Walls* case.

Subsequent decisions by the Courts and the Benefits Review Board in 1977 and 1978 adopted the view of the Third Circuit in *Bowman* and Judge Fath in *Walls*.[4]

CONCLUSIONS OF LAW

Section 12(d) of the Act provides that failure to give the employer the notice of injury mandated by Section 12(a) will bar a claim for compensation in all but two situations:

In September, 1975, in *Davis* v. *Strachan Shipping Co.*, 22 BRBS 272 (1975), the Board stated, at p. 274:

> All that is necessary is that the employer have knowedge of the disease; there need not be any knowledge of employment relationship.

3. The Court held:

> "It is obvious that the knowledge requirements in sections 912(d) and 930(f) must refer to knowledge on the part of the employer of an injury sustained or an ailment incurred as a result of working conditions for which the employer is responsible. Such knowledge must relate to the person injured, as well as to an injury arising from the employment. We cannot infer a congressional intent that the knowledge requirement can be fulfilled, and that the employer may therefore be liable, when the employer has no reason to know whether it is the party responsible for the injury or ailment of a particular employee."

4. *Strachan Shipping Company* v. *Davis*, 571 F.2d 968 (5th Cir. 1978); *Sun Shipbuilding & Dry Dock Company* v. *Walker, supra;* and the Benefits Review Board's decision affirming Judge Faith in *Walls* v. *Sun Shipbuilding and Dry* Company, 6 BRBS 190 (May 20, 1977).

(1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or

(2) *if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given*; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death. [Emphasis added.]

In light of the Third Circuit's findings that (1) notice of Claimant's injury was not given to Sun Ship within 30 days after November 25, 1975 as required by Section 12(a), and (2) Sun Ship did not have knowledge of Claimant's injury within the meaning of Section 12(d)(1), this claim must be denied unless I, as successor to the Deputy Commissioner, find that the failure to give notice was excusable because, "for some satisfactory reason notice could not be given."

Claimant's counsel argued that a satisfactory reason includes reliance on one's lawyer and contended that in failing to advise its client to notify the Employer within 30 days of his knowledge of the work-related lung condition, counsel relied on existing case law, however, "even assuming that claimant's lawyer was negligent, which as will be seen he was not, still the claimant should not have to suffer." Counsel further contended that administrative law judges have "unlimited power to determine what is and what is not satisfactory reason under Section 912(d)(2) of the Act." Counsel also stressed the lack of evidence that the Employer has been prejudiced by the failure to give notice and urged that the failure should be excused in furtherance of the Act's humanitarian objectives.

In a post-hearing brief in support of Claimant's position, the Solicitor of Labor argued that Section 12(d)(2) should be applied to excuse any untimely notice, "unless consideration of the surrounding facts reveals a compelling reason why the claim should be barred." The Solicitor urged that the criteria to be examined are whether the failure to give timely notice impeded either prompt medical attention or timely investigation of the circumstances of the accident. The Solicitor further argued that in view of the lack of prejudice to the Employer and the confusing and unsettled state of the law at the time, "particularly in questions of procedure, harsh or hypertechnical constructions of the Act should not be permitted to deprive claimants of substantive rights which Congress secured for them under the Act."

In excellent initial and reply briefs, the Employer's counsel cited *Voris* v. *Eikel*, 200 F.2d 724 (5th Cir. 1952), *rev'd on other grounds*, 346 U.S. 328 (1953) as support for the proposition that the power of an administrative law judge to excuse untimely notice is not unlimited and that ignorance of a notice requirement is an insufficient ground to excuse an untimely notice. Counsel further argued that based upon the *Bowman* and *Walls* decisions, Claimant's counsel should have known that notice was required and Claimant is bound by the acts and omissions of his counsel.

There is very little guidance regarding the meaning of Section 12(d)(2) of the Act since its enactment in 1927.

In *Bethlehem Steel Corporation* v. *Parker*, 163 F.2d 334 (4th Cir. 1947) the Court offered the following dicta:[5]

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5. There the Deputy Commissioner excused the failure to give notice because claimant was not aware of the cause of his disability until he consulted an orthopedist and the Court upheld this exercise of discretion. As amended effective November 26, 1972, Section 12(a) now covers this situation by adding the words, "or thirty days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of the relationship between the injury or death and the employment.

> We think the wording of the Act, its purposes and its history, make it quite clear that the powers of the deputy commissioner to excuse the timeliness of the notice (as distinguished from the sheer failure to give any notice whatsoever) are very broad. This power is given by the Act in wide, general terms, and can be exercised by the deputy commissioner "for some satisfactory reason." Manifestly, the decision of what reasons are, and what reasons are not, satisfactory, is left to the deputy commissioner. The act sends out no principles, no standards, to guide the deputy commissioner in making the decision.

Relying on this case, Claimant's counsel argued in its brief, "no Court has found that the ALJ's discretion is limited in any way whatsoever.

However, in 1952, the Court of Appeals for the Fifth Circuit reached a very different result in *Voris* v. *Eikel, supra*. There the Court disagreed with the Deputy Commissioner's action excusing notice on several grounds which included illiteracy and ignorance as to the Act's reporting requirements.[6]

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6. The Court said:

> Finally, we agree fully with the district judge that the statute, providing as an alternative to knowledge of the owner or his agent in charge that if the deputy commissioner excuses the failure to give notice "on the ground that for some satisfactory reason such notice could not be given" the "Failure to give such notice shall not bar any claim", did not invest the commissioner with unlimited and unguided power to excuse or refuse to excuse. On the contrary, it set up a standard conformable to right reason to which, considering the primary purposes of Sec. 12 of the act in requiring prompt notice and presentation of claim, the reasons put forward by the deputy commissioner as satisfactory must reasonably conform.
>
> The reasons given by the deputy commissioner as satisfactory reasons why such notice could not have been given in this case are not, under the statute, reasons at all. They are mere excuses on grounds which the statute does not define as ex-

More recently, in interpreting and applying Section 13(a) of the Act, the United States District Court for the District of Columbia held in *Blackwell Construction Co.* v. *Garrell*, 352 F. Supp. 192 (U.S.D.C. D.C. 1972):

> It is well recognized that the Act is to be liberally construed in the light of its remedial and humanitarian purpose. Voris v. Eikel, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). The Court will not construe the Act so as to enable plaintiffs to escape liability to persons entitled to recover for an admittedly compensable death by reading into it technical restrictions on the tolling of the filing period which are inconsistent with the purpose of the Act.

There is no legislative history indicating how Congress intended the provision to be applied either prior to its enactment in 1927 or since that time. However, as

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cuses. If accepted in this and similar cases, they would largely nullify Sec. 12, making it unnecessary *to file a written notice or to bring home knowledge to the employer or his agent in charge*, or for deputy commissioner to furnish satisfactory reasons for excusing the failure to give notice. They would do this by writing into the statute exceptions from its provisions in favor of employees who: (1) were illiterate; (2) were not regular longshoremen; (3) had worked only a short time; (4) were not acquainted with the requirements about reporting; (5) had reported to their immediate gang pusher; and (6) might fall into any other categories which the deputy commissioner would from time to time invent or devise in further nullification of the statute. In short, the acceptance of these and similar reasons put forward by a deputy commissioner as satisfactory would rewrite the statute to give the deputy commissioner arbitrary power according to his whim or caprice to excuse or refuse to excuse.

We are sure that the congress had no intention to clothe the deputy commissioner with such power. In the absence of language compelling such a construction, no court would be justified in imputing such an intention to the Congress. In the presence of language such as this statute contains, we think no court could fairly impute such intention tc the congress or properly give the statute such effect.

indicated by counsel for Claimant and counsel for the Director, both Congress and the Courts have emphasized repeatedly the humanitarian aspects of the legislation and that it is not to be construed narrowly to defeat otherwise meritorious claims on procedural or technical grounds. This coincides with the reluctance of Courts to reject claims because a statute of limitation requirement has not been complied with. Thus Professor Larson states that, when confronted with the possible denial of a claim for untimely notice,

> "... both courts and legislatures have been inclined to ask whether either of the two purposes of the notice statute has miscarried because of the lack of literal compliance, the two purposes being the facilitation of prompt medical attention and the provision of opportunity for immediate investigation of the circumstances of the accident."

3 Larson, *The Law of Workmen's Compenation*, §78.30 (1976).

The Act contains two limitations provisions, Section 12 and Section 13. Section 13 requires the filing of a claim within one year after injury or death and, as indicated, Section 12 requires notice to the employer within the thirty day period. However, the impact of Section 13 was cushioned because, pursuant to Section 30(f) of the Act, the one year period is tolled until the employer files a report of the employee's injury. Additionally, as previously discussed, in 1972 Congress liberalized Section 12 and also Section 13 by writing into these provisions the requirement that the times do not begin to run until Claimant learns of the injury.

Section 13 is the more traditional "Statute of Limitations" type provision. Although it provides for a one year period, even that provision is tolled by Section 30(f). Section 12 refers to an extremely short 30 day period for notice, thus making it a very drastic provision. To temper its impact, Congress inserted two safety valves in the

Statute. These are Sections 12(d)(1) and 12(d)(2). In permitting the administrative Law Judge to excuse late notice, obviously Congress envisioned facts that differ from those in 12(d)(1). Furthermore, I believe Congress, aware of the harshness of the provision intended to afford administrative law judges a good deal of discretion in determining excusability in order to avoid harsh and unjust results which would be contrary to the humanitarian and beneficent goals of this legislation. The legislation intended to compensate employees for injuries that they sustained in connection with their work while at the same time, not being unfair to employers.

Although there are no guidelines set forth in connection with the application of Section 12(d)(2), I do not believe that Congress envisioned an arbitary application of this authority. Therefore, in my opinion a number of factors should be considered. These are (1) the length of time involved (2) whether the employer was prejudiced (3) the harm that will result to Claimant and, most important, (4) fault on the part of Claimant.

The length of time here was relatively short. The claim was filed on February 5, 1976 which was approximately 70 days after Dr. Theodos examined Claimant and approximately 53 days after counsel received Dr. Theodos' report. Even if the March 10, 1976 date, that the Employer received the claim, is used, the delay was approximately 75 days later than the 30 day requirement. Most "Statutes of Limitations" involve longer periods of time.

It would seem, as indicated by Professor Larson, that emphasis should be placed on whether the Employer was prejudiced rather than the policy of putting an end to litigation. The latter policy is traditionaly applied with respect to other limitations provisions including Section 13 of the Act. Applying this criterion, there was no evidence that the Employer was hampered either in evaluating Claimant's condition, in providing

treatment, in investigating the matter or that the delay prejudiced the Employer in any respect.

Applying the third factor, it is clear that the denial of this claim will penalize Claimant drastically. He is 61 years old, permanently, totally disabled as a result of his work-related lung condition, and he appeared to me to be physically and mentally feeble. It is obvious that the results of a denial of this claim on procedural grounds will . . . .

With respect to fault, Claimant, an Uneducated and unsophisticated individual, retained an experienced workers' compenstion law firm to represent his interests and he and his son, unaware of the Act's notice requirements relied upon counsel to do everything necessary to protect Claimant's interest.

Galfand, Berger urges that the state of the law led them to believe that notice was unnecessary. Although there were conflicting decisions, after learning about the decision in *Walls* and especially after learning about the decision in *Bowman*, that firm should have filed a Section 12 notice within 30 days of the date that Claimant learned of his work-related condition. However, should this failure of counsel be imputed to Claimants?

The Employer cites *Link* v. *Wabash Railroad Company*, 370 U.S. 626 (1962) in support of the argument that Claimant is bound by his counsel's actions or inactions. There the Court held:

> "Petitioner voluntarily chose this attorney as his representative in this action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."

However, in workers' compensation cases, especially under the facts of this case, I believe the views of the dissent in *Link* are more appropriate. There, Justice Black, with Chief Justice Warren concurring, wrote:[7]

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7. Mr. Justice Douglas also dissented and Mr. Justices Frankfurter and White took no part in the decision.

Moreover, to say that the sins or faults or delinquencies of a lawyer must always be visited upon his client so as to impose tremendous financial penalties upon him, as here, is to ignore the practicalities and realities of the lawyer-client relationship. Lawyers everywhere in this country are granted licenses presumably because of their skill, their integrity, their learning in the law and their dependability. While there may be some clients sophisticated enough in the affairs of the world to be able to select the good from the bad among this mass of lawyers throughout the country, this unfortunately cannot always be the case. The average individual called upon, perhaps for the first time in his life, to select a lawyer to try a lawsuit may happen to choose the best lawyer or he may happen to choose one of the worst. He has a right to rely at least to some extent upon the fact that a lawyer has a license. From this he is also entitled to believe that the lawyer has the ability to look out for his case and that he should leave the lawyer free from constraint in doing so. Surely it cannot be said that there was a duty resting upon Link, a layman plaintiff, to try to supervise the daily professional services of the lawyer he had chosen to represent him. How could he know, even assuming that it is true, that his lawyer was a careless man or that he would have an adverse effect upon the trial judge by failing to appear when ordered? How could he know or why should he be presumed to know that it was his duty to see that the many steps a lawyer needs to take to bring his case to trial had been taken by his lawyer? Why should a client be awakened to his lawyer's incapacity for the first time by a sudden brutal pronoucement of the court: "Your lawyer has failed to perform his duty in prosecuting your case and we are therefore throwing you out of court on your heels"?

Especially in compensation cases, the relationship between attorney and client is not between sophisticated businessman and attorney or knowledgeable principal and agent. Typically in cases under this Act, the client is poorly educated and knows little about the Act. Usually, as here, after selecting an experienced attorney he relaxes and places his full trust in counsel on the assumption that the attorney will do everything necessary to represent his interests and protect his rights. Especially where the time lapse is short, where there is no evidence of prejudice to the Employer and the harm to Claimant in barring his claim is great, I think that the Act's humanitarian goals would be thwarted by not excusing such untimely notice.

Therefore, pursuant to Section 12(d)(2) of the Act, I find that Claimant's failure to give timely notice pursuant to Section 12(a) of the Act is excusable.

ORDER

Judge David W. Pelkey's Order dated September 13, 1976 is hereby reinstated: That Order reads:

1. That Employer pay Claimant compensation for permanent total disability, beginning December 10, 1974, based on his average weekly wage of $202.43.

2. That, as to any installment of compensation required to be but not paid within 14 days after it became due, Employer pay Claimant an additional amount equal to 10 percent of any such installment.

3. That, as to any installment of compensation not paid when due, Employer pay Claimant interest at an annual rate of 6 percent until the date of payment.

EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: September 6, 1979
Washington, D.C.